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No. 99-478

Supreme Court, U.S.
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In The

Supreme Court of the United States

CHARLES C. APPRENDI, JR.,

Petitioner,

v.

STATE OF NEW JERSEY,

Respondent.

On Writ Of Certiorari
To The Supreme Court Of New Jersey

BRIEF OF AMICI CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND FAMILIES AGAINST MANDATORY MINIMUMS FOUNDATION AND ASSOCIATION OF FEDERAL DEFENDERS IN SUPPORT OF PETITIONER

STEVEN B. DUKE*
Yale Law School
127 Wall Street
New Haven, CT 06511
(203) 432-4959

LISA B. KEMLER
ZWERLING & KEMLER, P.C.
108 N. Alfred Street
Alexandria, VA 22314
(703) 684-8000

KYLE O'DOWD
Families Against
Mandatory Minimums
Foundation
1612 K Street, NW
Suite 1400
Washington, DC 20006
(202) 822-6700

PETER GOLDBERGER
50 Rittenhouse Place
Ardmore, PA 19003
(610) 649-8200

Attorneys for Amici Curiae

**Counsel of Record*

January, 2000

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

Whether the Due Process Clause permits the state to determine facts about a criminal charge which double the statutory maximum prison sentence without notice in the charging instrument and without proving those facts to a jury beyond reasonable doubt.

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BRIEF OF AMICI CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND FAMILIES AGAINST MANDATORY MINIMUMS FOUNDATION AND ASSOCIATION OF FEDERAL DEFENDERS IN SUPPORT OF PETITIONER

THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS and FAMILIES AGAINST MANDATORY MINIMUMS FOUNDATION and THE ASSOCIATION OF FEDERAL DEFENDERS file this amicus curiae brief pursuant to this Court's Rule 37.3(a) in support of petitioner Charles Apprendi's assertion of rights under the Fourteenth Amendment. Both petitioner and respondent have granted amici NACDL and FAMM and AFD consent to file this brief, and letters of consent have been filed with the Clerk of this Court.[1]

INTERESTS OF AMICI CURIAE

Families Against Mandatory Minimums Foundation (FAMM) is a nonprofit, nonpartisan organization that conducts research, promotes advocacy, and educates the public regarding the excessive cost of mandatory minimum sentencing. This cost is not limited to public expenditures but includes the perpetuation of unwarranted sentencing disparities, disproportionate sentences, and the transfer of the sentencing function from the judiciary

[1] No counsel for any party to this case authored this brief in whole or in part, and no person or entity, other than NACDL, FAMM, AFD and their members, made any monetary contribution to its preparation or submission. *See* Rule 37.6.

to the prosecution. Founded in 1991, FAMM has 30 chapters and 18,000 members nationwide. FAMM conducts sentencing workshops for its members, publishes a newsletter, serves as a sentencing clearinghouse for the media, and researches sentencing cases for pro bono litigation. FAMM does not argue that crime should go unpunished, but that the punishment should fit the crime. As an alternative to mandatory sentences, FAMM supports sentencing guideline systems that are more sensitive to differences in culpability.

FAMM's primary interest in this case is its potential impact on the interpretation of criminal statutes that prescribe mandatory sentences. In many cases, particularly under certain federal criminal statutes of the past fifteen years, facts that raise the maximum penalty also trigger a mandatory minimum sentence. A ruling in petitioner's favor on the question presented, while inoffensive to sentencing guideline systems like the U.S. Sentencing Guidelines, would result in fewer erroneous factual determinations being used to trigger mandatory minimum sentences.

The National Association of Criminal Defense Lawyers (NACDL), a nonprofit corporation, is the only national bar association working in the interest of public and private criminal defense attorneys and their clients. NACDL was founded in 1958 to ensure justice and due process for persons accused of crimes; foster the integrity, independence and expertise of the criminal defense profession; and promote the proper and fair administration of justice. NACDL has 10,000 members nationwide – joined by 80 state and local affiliate organizations with

28,000 members – including private criminal defense lawyers, public defenders and law professors committed to preserving fairness within America's criminal justice system. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in its House of Delegates. In this case, the NACDL is concerned about the denial of procedural protections, guaranteed criminal defendants by the Fifth, Sixth and Fourteenth Amendments, when a fact that raises the maximum penalty is determined to be a sentencing factor.

The Association of Federal Defenders (AFD) was formed in 1995 to enhance the representation provided under the Criminal Justice Act, 18 U.S.C. §3006A, and the Sixth Amendment of the United States Constitution. The AFD is a nationwide, nonprofit, volunteer organization whose membership includes attorneys and support staff of Federal Defender Offices. One of the AFD's missions is to file amicus curiae briefs to ensure that the position of indigent defendants in the criminal justice system is adequately represented. Although this case arises from a state prosecution, the Court's decision could significantly affect prosecutions under federal statutes that raise the statutory maximum penalty on the basis of factors other than recidivism.

STATUTES INVOLVED

New Jersey Code of Criminal Justice

2C:39-4 Possession of weapons for unlawful purposes

a. Firearms. Any person who has in his possession any firearm with a purpose to use it unlawfully against the person or property of another is guilty of a crime of the second degree.

2C:44-3 Criteria for sentence of extended term of imprisonment

> . . . The court shall, upon application of the prosecuting attorney, sentence a person who has been convicted of a crime other than . . . to an extended term if it finds, by a preponderance of the evidence, the grounds in subsection e.
>
> * * *
>
> e. The defendant in committing the crime acted . . . with a purpose to intimidate an individual or group of individuals because of race, color, religion, sexual orientation or ethnicity.

2C:43-7 Sentence of imprisonment for crime; extended terms

> a. In the cases designated in section 2C:44-3, a person who has been convicted of a crime . . . may be sentenced . . . to an extended term of imprisonment, as follows:
>
> * * *
>
> (3) in the case of a crime of the second degree, for a term which shall be fixed by the court between 10 and 20 years.

2C:43-6 Sentence of imprisonment for crime; ordinary terms; mandatory terms

> a. Except as otherwise provided, a person who has been convicted of a crime may be sentenced to imprisonment as follows:
>
> (1) In the case of a crime of the first degree, for a specific term of years which shall be fixed by the court and shall be between 10 years and 20 years;
>
> (2) In the case of a crime of the second degree, for a specific term of years which shall be fixed by the court and shall be between five years and 10 years.

STATEMENT OF THE CASE

Petitioner was convicted on his pleas of guilty to counts 3, 18 and 22 of a New Jersey indictment. Counts 3 and 18 charged him with possessing a firearm with an unlawful purpose. N.J. Code of Criminal Justice (N.J.C.C.J.) §2C:39-4. Count 22 charged possession of a prohibited weapon. Counts 3 and 18 were second degree crimes, carrying a sentencing range of 5-10 years. Count 22 was a third degree crime carrying a maximum prison term of 5 years. The plea agreement called for the sentence on this count to be concurrent with the sentence on the first two counts. In accordance with a reservation in the plea agreement, the prosecution then requested, pursuant to N.J.C.C.J. §2C:44-3e, that an extended term of imprisonment be imposed on count 18, and that the sentence range thereon be doubled to 10-20 years. This is the sentence normally imposed for first degree crimes.

N.J.C.C.J. §2C:43-6(1). The reason for the doubled sentence range provided by the statute, was that the defendant "acted with a purpose to intimidate . . . because of race, color, gender, handicap, religion, sexual orientation or ethnicity."

After a hearing, the sentencing judge determined by a preponderance of the evidence that defendant acted with a racial purpose and imposed an enhanced sentence on count 18 of twelve years in prison. (He received a seven-year concurrent sentence on the identical, unenhanced count 3). The New Jersey Supreme Court rejected petitioner's claims that this statute and the sentence enhancement under it are unconstitutional. *State v. Apprendi*, 159 N.J. 7, 731 A.2d 485 (1999). That issue is now before this Court.

SUMMARY OF ARGUMENT

The State of New Jersey effectively created two crimes relating to unlawful possession of firearms. The first, less serious crime, consists of possessing a firearm for *any* illegal purpose that includes using it against the person or property of another. *State v. Harmon*, 104 N.J. 189, 516 A.2d 1047 (1986). This is the general intent crime, a second degree crime calling for a prison sentence of 5-10 years. The other, more serious crime, consists of possessing a firearm for a specific prohibited purpose, such as intimidation because of race. This aggravated degree of crime carries a prison sentence of 10-20 years, the same as for a first degree crime. Effectively, therefore, the crime was elevated from a second degree crime to a

first degree crime by the racial purpose. Because it put no new label on the more serious crime, however, New Jersey thought it permissible to bypass the criminal trial and the jury in determining the specific intent for the crime and directed the sentencing judge to determine that element of the crime by a preponderance of the evidence. This was an impermissible circumvention of the state's obligations under *In re Winship*, 397 U.S. 358 (1970), and *Mullaney v. Wilbur*, 421 U.S. 684 (1975), to prove every element of the offense beyond a reasonable doubt and its obligation, under *Duncan v. Louisiana*, 391 U.S. 145 (1968), to provide a jury trial.

This Court has never held that the right to trial by jury can be denied for factual determinations about the offense charged which are necessary to determine the allowable sentencing range. It correctly observed just last Term in *Jones v. United States*, 526 U.S. 227, 119 S. Ct. 1215 (1999), that the Constitution appears to forbid such circumventions. If it were otherwise, the role of the criminal trial and the jury could be shrunk to little more than a formality, where the jury determines if the defendant committed *any* crime and the judge then determines the nature of that crime and selects the appropriate statutory sentencing range.

The decision below must be reversed. Doing so will not imperil any existing sentencing guideline systems or any prior decisions of this Court, such as *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), and *Almendarez-Torres v. United States*, 523 U.S. 224 (1998).

ARGUMENT

The Due Process Clause of the Fourteenth Amendment requires a state to prove "beyond a reasonable doubt . . . every fact necessary to constitute the crime . . . charged." *In re Winship*, 397 U.S. 358, 364 (1970). This obligation may not be circumvented by characterizing facts not as elements but "as factors that bear solely on the extent of punishment." *Mullaney v. Wilbur*, 421 U.S. 684, 698 (1975). The New Jersey Supreme Court departed from these bedrock principles in the decision below.

In broad terms, this constitutionally imposed duty applies to any facts relating to the defendant's culpability.[2] Clearly, any fact the legislature includes in the description of the offense is such but so is any fact left out of the description that increases the statutory sentencing range, at least if that fact is part of the conduct or circumstances surrounding the offense, including the accused's state of mind.[3] This Court recognized the power of this proposition last Term in *Jones v. United States*, 526 U.S. 227, 119 S. Ct. 1215 n.6 (1999).

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[2] *See* Barbara D. Underwood, *The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases*, 86 Yale L.J. 1299, 1338-48 (1977).

[3] This case does not present the question whether facts the determination of which has other direct penal consequences, such as parole eligibility or mandatory minimum sentences, can be determined without trial by jury. *See McMillan v. Pennsylvania*, 477 U.S. 79 (1986). Nor does it present the question whether facts relating to the defendant rather than to the offense itself, such as his prior criminal record, see *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), can be so determined.

The reason for this Due Process principle is twofold. *First*, the sentence authorized by the legislature for the crime is "a gauge of its social and ethical judgments . . . of the crime in question." *Duncan v. Louisiana*, 391 U.S. 145, 159 (1968). The statutory maximum penalty is therefore a measure of the seriousness of the crime. *See Baldwin v. New York*, 399 U.S. 66, 68-69 (1970). The greater the authorized sentence, the greater the condemnation associated with conviction and the greater the stigma and other collateral consequences to be expected from conviction. Thus, whenever the maximum sentence authorized for a crime is increased, so are the penal consequences, regardless of the sentence actually imposed.

Second, other than execution of an offender, imprisonment is the most severe deprivation a society can inflict. A term of imprisonment carries with it daily degradation which often also includes inadequate medical care, assault and rape. Many lives are wrecked by the experience. A decision that a person can receive a lengthy period of imprisonment should occur only in the most careful, guarded and error-free processes society can provide. Traditionally, that has included a criminal trial, before a jury, with the prosecution required to allege and prove every essential fact beyond a reasonable doubt. It would make no sense to require these procedures to adjudicate a garden-variety charge of felony theft but to permit the addition of a ten-year prison sentence, or more, based upon even less exacting standards than are required to prevail in a routine civil dispute.

American judges have long held great power to determine the appropriate criminal sentence and to find many facts relatively informally. *See Williams v. New York*,

337 U.S. 241 (1949); *United States v. Roberts*, 445 U.S. 552 (1980). But in most cases, at least in the Twentieth Century, judicial sentencing has been ameliorative; judges have determined facts in informal settings as grounds for mitigating a sentence, for imposing a sentence not only well short of the allowable maximum but even less harsh than the typical or normal sentence imposed for the offense. *See generally* Lawrence W. Friedman, *Crime and Punishment in American History* 406-13 (1993). Judges cannot be lenient unless they are free to find facts that justify their leniency. They cannot be free to find those facts unless they are also free to find that leniency is not warranted, that the entire factual landscape not only fails to justify mitigation or leniency, but that it is aggravating and warrants a higher than normal sentence (within the statutory range). In the traditional sentencing process, moreover, an almost boundless range of facts is examined for the purpose of gaining a global impression both of the offender and of the offense. Never is any single fact in that range determinative by itself of the ultimate sentencing judgment. What the State of New Jersey seeks to uphold in this case is a radical departure not only from traditional processes but from constitutionally protected values.

If the State of New Jersey can double petitioner's prison sentence because it determines, without the adversarial testing of a trial, without a jury, and without meeting the burden of proof required in a criminal trial, that he committed the crime with one of the specified purposes, there is no limiting principle that would prohibit it from increasing the sentence tenfold or from converting a felony carrying a normal prison sentence of one year into

a life sentence. And if it can double the sentence because of a particular purpose, it can do so because of virtually any other circumstance, either of the offender or the offense, that it specifies. The cherished protections of criminal trials could be shrunk to the point where the jury would merely determine if a defendant committed a generic "crime" and all other determinations could be arrogated to the informal, largely invisible, virtually unreviewable "sentencing" process. *See Monge v. California*, 524 U.S. 721, 118 S. Ct. 2246, 2255 (1998) (Scalia, J., dissenting). As this Court observed in *Jones v. United States*, the jury's role could thus be reduced to that of "low-level gatekeeping." 119 S. Ct. at 1224.

Accepting petitioner's argument in this case and applying the principles articulated in *Jones* does not imperil the holding in *McMillan v. Pennsylvania*, 477 U.S. 79 (1986). *McMillan* merely held that a legislature could constitutionally restrict a sentencing judge's discretion within the previously defined range of authorized punishment, upon a finding that a weapon was used in the crime, a finding that need not be made by the jury. As the Court noted in *McMillan*, the statute there "neither alters the maximum penalty for the crime committed nor creates a separate offense calling for a separate penalty; it operates solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it without the special finding of visible possession of a firearm." 477 U.S. at 88-89. While we think there is merit in Justice Stevens' position that the *Winship/Mullaney* principles also apply to facts which establish mandatory minimums as well as those which enlarge the allowable

maximums, *Jones v. United States*, 526 U.S. 227, 332 (concurring opinion), reconsideration of that issue can await another case, for *McMillan* itself distinguished mandatory minimum cases from those like the present which double the statutory maximum sentence.

Where, as here, the defendant's purpose or motive for the crime results in a doubling of the permissible sentencing range, the legislature has, as in *Jones* (*see* 119 S. Ct. at 1228), effectively created two grades of crime: one for possessing a firearm for any illegal purpose and another, far more serious, of possessing such a firearm for *specific* illegal purposes such as racial animosity. The less serious firearm possession crime is the general intent version, and the more serious crime requires specific intent. If the legislature had so labeled what it was doing, perhaps calling the aggravated offense a "hate crime" (or "unlawful possession of a firearm in the first degree") there could be no doubt of the constitutional status of petitioner's specific purpose. The difference between that and the statutory structure here is nothing more than labeling and arrangement or organization of words.

The statutory scheme involved here is analogous to the statute in *Mullaney v. Wilbur*, and traditional criminal homicide statutes, which distinguish between murder and manslaughter by requiring malice for murder but a lesser criminal intent for manslaughter. It also resembles aggravated assault crimes which punish assaults with specific purposes, such as rape, more severely than other assaults. *See generally* Wayne R. LaFave and Austin W. Scott, Jr., *Criminal Law* 695-96 (2d ed. 1986). No one contends that facts which convert a simple assault to an

aggravated one can be determined solely by the sentencing judge.

Nor does this Court's decision in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), support the decision below. While that decision was a strong break from tradition in allowing the maximum sentence range to be increased upon a finding of fact not proved to a jury's satisfaction, the fact in question was a prior criminal conviction, part of the defendant's history, a matter not involving the offense on trial and rarely open to serious dispute. Moreover, *Almendarez-Torres* can be justified on a collateral estoppel theory: the defendant already enjoyed full due process protections in the prior adjudication of his guilt and perhaps should not be permitted to litigate the issue again. *See* Note, *Awaiting The Mikado: Limiting Legislative Discretion to Define Criminal Elements and Sentencing Factors*, 112 Harv. L. Rev. 1349, 1362-1364 (1999).

Nothing in the position taken by petitioner in this case calls into question the federal guideline sentencing system or any similar system which limits the sentencing judge's discretion based upon factual findings or the absence thereof. All such systems operate within the statutory ranges prescribed by the legislature and do not attempt to expand or alter them in any way.

Moreover, the issue that triggered the expanded sentencing range in this case, the defendant's specific motive or purpose, is a *mens rea* question particularly suited to litigation before and determination by a jury. *See Wisconsin v. Mitchell*, 508 U.S. 476 (1993) (jury determined racial motive which aggravated the offense). It is not an objective, observable fact like a prior criminal conviction or

the use of a handgun but an elusive, vague conception requiring reconstruction of the subjectivities of the accused. Allowing such a determination to be the basis for doubling a sentence is dubious enough, but to put this power in the hands of a judge, who often has limited personal experience with racially motivated behavior, is indefensible, both as a matter of policy and of principle.

Requiring that all facts necessary to determine the sentencing maximum be proven beyond reasonable doubt to a jury is not greatly burdensome, especially where, as here, the facts to be found concern the criminal act itself and the specific purpose therefor. But as this Court noted in *Jones*, even if somewhat burdensome, the constitutional principles at stake well warrant the burden. *Jones v. United States*, 119 S. Ct. at 1228 n.11.

The decision below is an assault on the venerable role of the jury in constitutional law. A jury guards against arbitrary or mistaken imposition of criminal sanctions by rendering a verdict that authorizes a penalty within the statutorily prescribed range. If a judge can exceed this range by finding a fact, the jury's role is appropriated and the defendant's rights eroded. Society's confidence in any resultant sentence must accordingly be diminished. This is no less true when accomplished by legislative sleight of hand – adopting a generic "sentence enhancement" provision applicable to numerous crimes – than if attempted directly and forthrightly. The differences are entirely matters of legislative labeling and must not be accorded constitutional significance. The Due Process Clause of the Fourteenth Amendment is by its nature a restriction on state legislative power. No construction of that Clause

which invites or permits semantic circumlocution can be correct.[4]

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[4] Should this Court reject petitioner's claim that notice, proof beyond reasonable doubt and a jury trial are constitutionally required to determine his racial purpose in possessing the firearm, it should still reverse the court below for finding that a mere preponderance of evidence is sufficient to determine his culpability. Even if New Jersey's purpose-based enhancement is not labeled an "element," the fact that it doubles the statutory penalty requires that the prohibited purpose be reliably found by the fact-finder at sentencing. *Cf. Townsend v. Burke*, 334 U.S. 736, 741 (1948) (sentences based on materially untrue or unfounded assumptions violate due process). A finding by a mere preponderance of evidence does not adequately ensure the reliability of the sentencing decision, especially in cases such as this, where the determinative fact involves *mens rea*. A higher burden is also appropriate due to the stigma that attaches to a finding that a defendant acted out of racial animus. *Cf.* USSG §3A1.1(a) (sentencing guideline providing for 3-level increase for racially motivated crime; requiring sentencing determination "beyond a reasonable doubt").

CONCLUSION

The decision of the court below must be reversed as inconsistent with the Fourteenth Amendment to the United States Constitution.

Respectfully submitted,

STEVEN B. DUKE*
KYLE O'DOWD
LISA B. KEMLER
PETER GOLDBERGER

*Counsel of Record

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